United States Court of Appeals

for the Second Circuit

APPELLANT'S SUPPLEMENTAL BRIEF

75-7457

75-7457

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JAMES MORRISSEY,
Plaintiff-Appellant-Appellee,

vs.

NATIONAL MARITIME UNION OF AMERICA,
Defendant-Appellant-Appellee,

and

JOSEPH CURRAN, SHANNON J. WALL and CHARLES SNOW,
Defendants-Appellants.

SUPPLEMENTAL BRIEF ON BEHALF OF DEFENDANT-APPELLANT JOSEPH CURRAN

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UNITED STATES COURT OF APPEALS
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SUPPLEMENTAL BRIEF ON BEHALF OF
DEFENDANT-APPELLANT JOSEPH CURRAN

STATEMENT OF THE CASE

I. Preliminary Statement

This brief is submitted on behalf of Defendant-Appellant Joseph Curran ("Curran") to supplement the Core Brief on Behalf of Defendants-Appellants ("Core Brief"), which is expressly incorporated herein by reference.

II. The Proceedings Below

This action was brought by Plaintiff-Appellant-Appellee James Morrissey ("Morrissey") for alleged violations of two sections of the Landrum-Griffin Act, 28 U.S.C. §§ 411(a)(2) and 411(a)(5)[1/], and for malicious prosecution under

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1/ 29 U.S.C. § 411 provides:

> "(a)(2) Freedom of speech and assembly.--Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.
>
> * * *
>
> "(5) Safeguards against improper disciplinary action.--No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.
>
> "(b) Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect."

the law of New York against, among others, the National Maritime Union ("NMU") and certain officers and employees thereof. Defendant-Appellant Curran appeals from the Judgment and Order of the court below denying the defendants' motion for a new trial and for judgment n.o.v. following a jury verdict (a) awarding compensatory damages of $500 and punitive damages of $200,000 (of which $100,000 was awarded against Curran) on the counts based on 29 U.S.C. §§ 411(a)(2) and 411(a)(5), and (b) awarding $3,000 compensatory damages and $110,000 punitive damages (of which $25,000 was awarded against Curran) on the malicious prosecution count. (703A)[2/]

III. Additional Facts Relevant to the Appeal of Defendant-Appellant Curran

On July 1, 1971 Curran, then President of the NMU, was in Boca Raton, Florida.

On that date Morrissey was distributing literature in the union hiring hall in violation of union policy prohibiting solicitation and the distribution of literature

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2/ All references to the Appendix are designated "A"; all references to the Exhibit Volume are designated "E".

other than union publications, stated in a notice which had been posted in the hiring hall for at least one year. Morrissey was asked upon several occasions by James Nimmo ("Nimmo"), a master-of-arms employed by the union, to distribute his pamphlets outside (334A), and refused to do so (355A). Nimmo advised Charles Snow, the NMU Chief of Security ("Snow"), of Morrissey's refusal to comply with the posted notice (335A), 428A). Snow then called Stanley Gruber, Esquire, an attorney who had represented the union since 1963, to ask what action could be taken in response to Morrissey's refusal to obey the posted rule.[3/] Gruber advised that Snow could properly request the arrest of Morrissey by the police if Morrissey persisted in his refusal to obey the posted rule (526A). Morrissey again refused Nimmo's request to distribute his literature outside the hall; Nimmo summoned the police (457A), who also asked Morrissey to cease distribution inside the hiring hall. When Morrissey again both refused, told the police to lock him up, he was arrested (459A). Charges against Morrissey were prepared by a police officer, on the complaint

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3/ Two attorneys in Gruber's law firm were named as defendants; however, the actions against them were dismissed with prejudice and without costs, upon application by plaintiff's counsel, and without objection by counsel for the attorneys. (499-500A).

of Nimmo (438A) which were dismissed at a preliminary hearing on July 20, 1971 (776E-806E).

Curran (a) was not consulted concerning Morrissey's arrest, either by Snow or by Stanley Gruber, Esquire, (b) did not know about that arrest until a few days after it happened (359A), and (c) did not ask what the charges against Morrissey were (366A). Snow alone made the decision to have Morrissey arrested (458A-459A0. Moreover, Snow spoke only infrequently to Curran in the period between January 1, 1969 and July 1, 1971 (462A).

There was no testimony that Curran advised, concurred in, or played any part in Morrissey's prosecution, nor even that Curran knew when the Morrissey hearing was scheduled.

The NMU has a total membership of approximately 47,500. It operates through 33 port offices or branches located on the Atlantic and Pacific coasts, on the major rivers and lakes, and in Puerto Rico, Panama, the Canal Zone, and Yokohama, Japan. Wirtz v. National Maritime Union of America, 284 F. Supp. 47, 52 (S.D.N.Y.), aff'd 399 F.2d 544 (2d Cir. 1968). The NMU holds a national convention every three years (831E, Art. 5, § 1). The NMU National Council, composed of the eight

national NMU officers and all officers in charge of ports (831E, Art. 5, § 3), is the governing body of the NMU between conventions (831E, Art. 7, § 1). The NMU National Office, composed of the eight national NMU officers (831E, Art. 5, § 4), is the governing body of the NMU between meetings of the National Council (831E, Art. 8, § 2(c)).

ARGUMENT

I. The Court Below Erred as a Matter of Law in Denying Curran's Motion for Judgment N.O.V. on the Landrum-Griffin Counts

As stated in the Core Brief, the court below erred in submitting the issue of liability of the individual defendants for violation of 29 U.S.C. § 411(a)(2) to the jury, since that section imposes no duty of any kind on individual officers or employees of labor unions.

In addition, individual union members are not subject to liability under Section 411 of the Landrum-Griffin Act for acts undertaken within the scope of their authority. White v. King, 319 F. Supp. 122 (E.D. La. 1970); Gulickson v. Forest, 290 F. Supp. 457 (E.D.N.Y. 1968). See also Nix v. Fulton Lodge No. 2, 262 F. Supp. 1000 (N.D. Ga. 1967), aff'd in part, vacated in part on other grounds, 415 F.2d 212 (5th Cir. 1969).

The court below instructed the jury to find for plaintiff if it found that the defendants, or any of them, violated either section of the Landrum-Griffin Act. That charge was clearly erroneous. An individual has no liability, as aforesaid, under 42 U.S.C. § 411(a)(2). And it is clear from the cases cited above that to establish liability of an individual union member for violation of 29 U.S.C. § 411 the jury must find both that the union member participated in the violation and that he was acting outside the scope of his authority.

Moreover, since the jury returned a verdict against the NMU on the Landrum-Griffin counts which could only be based on the acts of the individual defendants, the jury necessarily found that the individual defendants participating in the alleged Landrum-Griffin violations were acting within the scope of their authority. Having been found to have acted within the scope of their authority, the individual defendants cannot be held liable on the Landrum-Griffin counts.

Indeed, there is no evidence at all that Curran played any part in the purported Landrum-Griffin violations. In fact, the court below in its opinion denying defendants'

motion for judgment n.o.v. or a new trial, purported to justify the jury's verdict against Curran on the Landrum-Griffin counts on the basis of Curran's inaction, remarking that:

> "[W]hile he [Curran] stated that he did not himself know whether the notice was posted in the Union Hall on July 1, 1971, he did not disclaim knowledge of its existence, or indicate disapproval of the 'policy' in any way. Moreover, he stated that he made no effort to have the charges against Morrissey dropped, in the context of statements from which the jury could infer general approval of Snow's action...." (710A)

Thus, not only was there a finding as to the Landrum-Griffin counts that Curran acted outside the scope of his authority, there was no evidence that Curran acted at all. In short, either Curran did not participate in the violations, or he acted within the scope of his authority. In either event, he cannot be liable. Accordingly, the court below erred in denying Curran's motion for judgment n.c.v. on the Landrum-Griffin counts.

II. The Court Below Erred in Failing to Set Aside the Verdict for Malicious Prosecution Against Curran Who Did Not Initiate or Participate in the Prosecution

Liability for malicious prosecution, an intentional tort, can only be based on active conduct in initiating an arrest or causing the continuance of the prosecution. As was stated in Loftus v. Columbia Ribbon and Carbon Manufacturing Co., 61 N.Y.S.2d 102 (Sup. Ct. Nassau Co. 1945) in order to maintain an action for malicious prosecution it must be shown that the defendant was "affirmatively active in instigating or participating in the prosecution." "[T]here must be a showing of some deliberate act...." Best v. Genung's, Inc., 46 A.D.2d 550, 552, 363 N.Y.S.2d 669, 672 (3d Dept. 1975).

> "Mere passive knowledge, or acquiescence or consent in the acts of another person, is not sufficient to impose liability for malicious prosecution."
> Wolter v. Safeway Stores, Inc., 60 F. Supp. 12, 15 (D.D.C. 1945), aff'd 153 F.2d 641 (D.C. Cir.), cert. denied 329 U.S. 747 (1946).

Accord: Everson v. First Trust and Deposit Co., 46 A.D.2d 722, 360 N.Y.S.2d 338 (4th Dept. 1974); Gregorio v. Terminal Trading Corp., 39 A.D.2d 705, 331 N.Y.S.2d 755 (2d Dept. 1972);

MacCauley v. Theodore B. Starr, Inc., 194 App. Div. 643, 186 N.Y.S. 197 (1st Dept. 1921); Tyson v. Joseph H. Bauland Co., 68 App. Div. 310, 74 N.Y.S. 59 (2d Dept. 1902); Wassing v. Kennedy, 9 Misc. 2d 672, 170 N.Y.S.2d 58 (Sup. Kings Co. 1957),

As the court below observed: "...Mr. Curran, as far as I can tell, had nothing to do with the arrest..." (508 A) Indeed, the evidence is clear that the decision to summon the police and cause Nimmo to lodge the criminal complaint was made by Snow upon the advice of union counsel, and that Curran did not learn of the arrest until after it occurred.

Snow and Nimmo consulted union counsel and caused the arrest without the knowledge or participation of Curran. Having been advised by union counsel that Morrissey had committed a misdemeanor, Snow and Nimmo would obviously be expected to continue the prosecution without any further or additional advice or authorization. That such was the case is apparent from the fact, acknowledged by the court below, that the record is totally devoid of any evidence that Curran in any way participated in the prosecution.

Nevertheless, the court below submitted the issue of Curran's liability to the jury on the theory that because

Curran "made no effort to have the charges against Morrissey dropped" (710A) and union counsel appeared at the hearing (508A) "the jury could infer general approval of Snow's action." (710A)

The cases cited above establish that "approval" cannot support an action for malicious prosecution. Unless a defendant actively causes the arrest or prosecution, he cannot be liable for malicious prosecution. And, as the court below acknowledged there is no evidence that Curran actively caused the arrest or prosecution.

Nor can Curran be held liable for the acts of Snow or any other union member. As the Court held in Childers v. Beaver Dam Plantation, Inc., 360 F. Supp. 331, 335 (N.D. Miss. 1973), an officer of a corporation cannot be held liable for malicious prosecution by an employee of the corporation unless the officer personally participated therein. For it is the universal rule that a corporate officer is not vicariously liable for the torts of corporate employees, but can only be liable for his own active tortious conduct. Armour and Co. v. Celic, 294 F.2d 432, 439 (2d Cir. 1961); Phelps Dodge Refining Corp. v. F.T.C., 139 F.2d 393 (2d Cir. 1943); Zubik v. Zubik, 384 F.2d 267, 275 (3d Cir. 1967); Lobato v. Pay Less Drug Stores,

261 F.2d 406 (10th Cir. 1958); Teledyne Industries, Inc. v. Fox Corp., 373 F. Supp. 191, 196 (S.D.N.Y. 1974); Blaustein v. Pan American Petroleum & Transport Co., 263 App. Div. 97, 31 N.Y.S.2d 934, aff'd 293 N.Y. 281 (1944); 3 Fletcher Cyc. Corp. § 1137, pp. 782-3 (Perm. Ed. Rev. 1965).

The same principle applies to the liability of union officers. There is no principle of law which would sanction the imposition of vicarious liability on an officer of a union with approximately 47,000 members, with 33 port offices located throughout the United States, in Puerto Rico, Panama, the Canal Zone and Yokohama, Japan, for the tortious acts of the members of that union. Additionally, the NMU constitution provides that union affairs shall be governed by the eight member National Office. Curran had no authority to act alone. As the courts have recognized, vicarious liability is an exception to basic principles of tort law, which should be confined to situations where public policy requires that such liability be imposed. See, e.g., Rochez Bros. v. Rhoades, CCH Fed. Sec. L. Rep. ¶95,313 (3d Cir. 1975); Zweig v. The Hearst Corp., CCH Fed. Sec. L. Rep. ¶95,256 (9th Cir. 1975).

Since Curran did not participate in the arrest or the prosecution, and cannot be held vicariously liable for the acts of those who did, the court below erred in failing to set aside the verdict against Curran for malicious prosecution.

III. The Court Below Erred in Permitting the Jury to Award Damages Against Curran for the Arrest

A defendant cannot be liable for damages resulting from malicious prosecution prior to his participation in that prosecution. Van Sant v. American Express Co., 169 F.2d 355, 370 (3d Cir. 1948). It is undisputed, and the court below acknowledged, that Curran did not know of or participate in the arrest. Nevertheless, the court below instructed the jury that it could hold Curran liable for all damages incident to both the arrest and the subsequent prosecution. The only actual damages suffered by plaintiff as a result of the prosecution were expenses incurred in its defense. The balance of plaintiff's damages were, as the court instructed the jury, damage to reputation and mental anguish (622-627A). Much, if not all, of damage to reputation may be presumed to have occurred from the arrest alone, for which Curran cannot

be held liable. Therefore, the court below erred in failing to order a new trial as to Curran on the malicious prosecution count, and on the count under 42 U.S.C. § 411(a)(5) which is based on the same facts as the malicious prosecution count.

IV. The Court Below Erred in Instructing the Jury That it Could Award Punitive Damages Against Curran

As stated in the Core Brief, punitive damages may not be awarded for violations of 29 U.S.C. § 411 because that statute makes no provision for punitive damages, and where Congress intends to permit such damages they are explicitly included in the statute. See, e.g., 18 U.S.C. § 2520(2)(b) (which provides damages for eavesdropping).

Also, it was error as a matter of law to submit to the jury the issue of punitive damages as to Curran. Punitive damages cannot be based on any act of Curran, because, as the court below recognized, there was no evidence of any act by Curran. Instead, the court below permitted the jury to find Curran liable for his inaction in failing to prevent the acts complained of, even though the responsibility for union policy and practices was vested in the eight-member National Office. Such inaction cannot satisfy the standard for the award of

punitive damages under New York law. Such inaction is not recklessness which is "close to criminality," the standard for punitive damages enunciated in Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 843 (2d Cir. 1967). Nor is it necessary to award punitive damages for such inaction "to punish the defendant and to deter him and others from further and similar acts and as a protection to the public." Gordon v. Nationwide Mutual Insurance Co., 62 Misc. 2d 689, 309 N.Y.S.2d 420 (Sup. Ct. Westchester Co. 1970), aff'd 37 A.D.2d 265, 323 N.Y.S.2d 550 (2d Dept. 1971), rev'd on other grounds, 30 N.Y.S.2d 427, 334 N.Y.S.2d 601 (1972), cert. denied, 410 U.S. 931 (1973). Accord: DeMarasse v. Wolf, 140 N.Y.S.2d 235, 238 (Sup. Ct. Queens Co. 1955).

The court below charged the jury that, as to the Landrum-Griffin counts: "[I]f you further find that the defendant you are considering acted with actual malice or reckless or wanton indifference to the rights of plaintiff, you may award punitive damages." (628A) As to the malicious prosecution count the court below charged: "You may, if in the exercise of your discretion, you find that the degree of the particular defendant's malice or recklessness warrants your doing so, award plaintiff punitive damages." (628A)

There being no act of Curran on which an award of punitive damages could be based, it is clear that the punitive damages awarded against Curran were predicated upon "malice" in the sense of personal ill will. And the only evidence in the record to support a finding that Curran experienced personal animosity towards Morrissey were vituperative statements made by Curran concerning dissident union members, who ran unsuccessfully for union office against the incumbent officers, and regularly attacked Curran personally, and the union leadership and its policies.[4/] Morrissey was one of the dissident union members, who ran for Secretary-Treasurer of the NMU in 1966 and 1969 and authorized literature circulated among union members attacking Curran as well as union leadership and policies.

Curran, at his deposition taken on behalf of plaintiff, stated, in response to questioning by Morrissey's counsel, that Morrissey was included among the dissident group which was the subject of Curran's remarks. Those Curran statements introduced

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4/ There was evidence that Morrissey had brought an action to set aside the NMU pension plan for non-elected officials, however since Curran was an elected official that litigation could not affect his rights.

in evidence by plaintiff objected to by counsel for Curran, included:

(1) Statements in the president's report of the NMU 1969 National Convention immediately after the contested election in which Morrissey was a candidate referring to dissident union members, as follows:

> "Then there were the communists. There could not have been any more organized, more ruthless, better trained enemy than the communists. They got a powerful hold on the union in the early years. When we moved to break that hold, they fought like tigers to hold it with their orders and their support coming from the National Communist Party and the Kremlin itself. We defeated them after a tremendous battle and then we had to splinter group hacks and the hangers on tried to move in and tried to take their place."
>
> "We said at one of our conventions back in the early days that as long as the NMU kept moving forward we were going to have enemies, someone was going to try to stop us or destroy our influence. That has proven true over the years."
>
> "In the case of the mariners and the five pointers, it was the shipowners who backed the attacks. The communists, of course, were out to use the union for the Kremlin's purposes. There have been others, politicians, gangsters, corrupt lawyers, opportunists of every description have at

> one time or another tried to get their hooks into the NMU or to damage the union in some way and, of course, there is a hostile union group which feels any problems for the NMU are good for them." (218-220A)

(2) A remark attributed to Curran in the minutes of the 1969 NMU convention, as follows:

> "[T]he Landrum-Griffin Law said he and his ilk must remain in the union and we have no recourse even though they foul up each rule and principle, even though they become lower than scum." (380A)

(3) 1966 Curran campaign literature containing the statement that Morrissey had been convicted of armed robbery (which was true), and had made false statements in a questionnaire and bond application concealing that conviction. (813E)

To permit the award of punitive damages based on these statements violates both Curran's constitutional rights of free speech, and federal labor law.

Morrissey was a candidate for union office and an active opponent of union leadership and policies. Clearly speech concerning Morrissey and his views constitutes comment on matters

of public interest, and is constitutionally protected speech. As such, damages under state law may not be awarded based on that speech, absent proof of knowing or reckless falsity. Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970)(in which an award of damages was reversed where the plaintiff was called a "blackmailer"); Pickering v. Board of Education, 391 U.S. 563 (1968); Time, Inc. v. Hill, 385 U.S. 374 (1967); Garrison v. Louisiana, 379 U.S. 64 (1964); New York Times Co. v. Sullivan, 376 U.S. 254 (1964). See, also, Thornhill v. Alabama, 310 U.S. 88 (1940).

Curran's comments are also protected speech under federal labor law, which the Supreme Court has held may not be penalized by state law damage awards. Indeed, the Supreme Court has explicitly recognized that the protection of the federal labor laws extends to speech concerning union affairs, which is intemperate, abusive or insulting. Old Dominion Branch No. 496 v. Austin, 418 U.S. 264 (1974); Linn v. United Plant Guard Workers of America, 383 U.S. 53 (1966). For, as this Court noted in Salzhandler v. Caputo, 316 F.2d 445, 450 fn. 7 (2d Cir.), cert. denied, 375 U.S. 946 (1963);

> "'Union debates are characterized by vitriol and calumny, and campaigns for office are salted with overstated accusations. Defining the scope of fair comment in political contexts is never easy, and in this context is nearly impossible.'"

That the protection of the federal labor laws extends to such vitriol and calumny is clear from the statement of the Supreme Court in Old Dominion Branch No. 496 v. Austin, supra, that: "The Court in Linn recognized that such exaggerated rhetoric was commonplace in labor disputes and protected by federal law." (418 U.S. at 286). In that case the plaintiff was called "a traitor to his God, his country, his family and his class." (418 U.S. at 268). As these cases demonstrate, under federal labor law the right of free speech relating to union matters guaranteed by 29 U.S.C. § 411(a)(2) is protected from state law damage awards, as well as from union infringement. And that right of free speech is guaranteed to Curran, as well as to Morrissey.

Further, such speech is protected from state damage awards even if actuated by ill feeling.

> "Instructions which permit a jury to impose liability on the basis

> of the defendant's hatred, spite, ill will, or desire to injure are 'clearly impermissible.' Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 82, 19 L.Ed.2d 248, 88 S.Ct. 197 (1967). '[I]ll will toward the plaintiff, or bad motives, are not elements of the New York Times standard.' Rosenbloom v. Metromedia, Inc. 403 U.S. 29, 52 n 18, 29 L.Ed.2d 296, 91 S.Ct. 1181 (1971)." Old Dominion Branch No. 496 v. Austin, supra, 418 U.S. at 281.

The Constitution and federal labor laws protect such speech from all penalties imposed under state law, whatever their form, Pickering v. Board of Education, supra, since whatever the form of the penalty, the chilling effect on free speech is the same. Therefore, Curran's protected speech cannot be penalized by punitive damage awards.

Moreover, the Supreme Court has indicated that even where speech falls outside of the protection of the New York Times standard, that speech which is not knowingly false may not be punished by awards of exemplary damages, stating:

> "In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to

> the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship...." Gertz v. Welch, Inc., 418 U.S. 323, 350 (1974).

That union debate would be effectively extinguished if it could be penalized by punitive damages awards is plain from the very union literature authored by Morrissey that the court below held was entitled to protection of 29 U.S.C. § 411(a)(2), which stated in "AN OPEN LETTER TO JOSEPH CURRAN":

> "Your machine spent a full month rigging the June 28th New York membership meeting. You hired gang bosses to roundup your motley crew of hoodlums at $30 per day. You couldn't hire enough local bums so you imported additional finks from the outports. You organized an army of bodyguards to protect yourself from the membership...."
>
> "We'll tell you Joe, You're scared and you're all shook up because you have no answer to the seamen's problems of jobs and pension security *** you're driving 11,400 unemployed Grade 1 book members into the poorhouse. And you don't give a damn." (767E)

If Morrissey failed to act to prevent a tortious act committed by a third party against Curran, evidence of those statements alone would be likely to result in the same magnitude

of punitive damages awarded against Curran. What would thereby be discouraged would not be the inaction, but the protected speech. If the free speech guarantee of 29 U.S.C. § 411(a)(2) is to have any meaning at all, that speech cannot be introduced in evidence to support an award of punitive damages. There being no evidence other than Curran's protected speech which would support an award of punitive damages against Curran, that award should be reversed.

V. The Court Below Erred in Refusing to Grant a Continuance to Permit Curran's Attendance at the Trial

As the Core Brief points out, the refusal of the court below to grant a continuance based on Curran's illness deprived all of the defendants of a fair trial. Curran in particular was irretrievably prejudiced by that refusal. The record is bare of evidence of any affirmative action by him. As a result, both judge and jury imposed judgment on Curran based on conjecture, inaction and protected speech. Without Curran's testimony there could be no defense in such a context. Also, the trial court permitted the introduction of Curran's unflattering statements about union dissidents, the prejudicial effect of which would necessarily be greatly exaggerated by Curran's failure to appear at the trial, creating the impression of

contempt for Morrissey and the proceedings. Finally, as discussed below, the court below, in violation of the most basic principles of evidence, admitted evidence of telephone calls where neither the conversants nor the subject matter of the conversations could be ascertained. The court thereby gave the jury free rein to indulge in whatever speculation they chose as to those telephone conversations, and to base their verdict on such speculationa. Only Curran's testimony as to his participation (or lack thereof) in those conversations, and as to their content (if it was known to him) could counteract the effect of that invitation to use that incompetent evidence to impose liability.

VI. The Admission in Evidence by the Court Below of Telephone Bills Without Proof of the Conversants and Content of the Conversations Constitutes Reversible Error

The court below, over the objections of counsel for defendants, admitted into evidence telephone bills for calls made in June and July, 1971 from the union office in New York to the telephone number in Boca Raton, Florida listed in the name of Joseph Curran, without any proof whatever of the identity of the parties to those conversations or of their content. Moreover, the court below based its conclusion that

there was evidence which connected Curran with the prosecution (at most, an inactive connection, almost entirely on the evidence of those telephone calls. (562-563A, 712A)

Such evidence is unquestionably incompetent and inadmissible. See, e.g., Andrews v. Hotel Sherman, 138 F.2d 524, 529 (7th Cir. 1943); Campbell v. United States Air Compressor Co., 34 F. Supp. 402 (N.D. Ill. 1940); Brereton v. McEvoy, 44 A.D.2d 594, 353 N.Y.S.2d 512 (2d Dept. 1974); Fisch, New York Evidence § 17, p. 7.

The reason for that rule is readily apparent. No inference of any fact could reasonably be based on the mere fact that a telephone call was made other than that a telephone call was made. Accordingly, the verdict against Curran, being based largely, if not entirely, on inadmissible evidence, must be reversed.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the Core Brief, it is respectfully submitted that the Judgment below should be reversed, that Judgment N.O.V. should be granted

to Defendant-Appellant Joseph Curran, or, failing that, a new trial should be ordered.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, CAROLE A. BRODERICK, hereby certify that I caused to be served on all counsel of record this 4th day of December, 1975, the foregoing Supplemental Brief on Behalf of Defendant-Appellant Joseph Curran, by placing the aforementioned in the United States mail, postage prepaid, first-class mail.

Carole A. Broderick

CAROLE A. BRODERICK